AN ANALYSIS OF THE PROBLEM OF REFORMING AMERICAN JUDICIAL ADMINISTRATION.

IT IS so generally charged that American Courts as now constituted are inefficient, especially the courts whose existence depends upon the sovereignty of the several states, that it would seem unnecessary to preface this article with exemplifications of the deficiencies of our judicial administration, before the problem of reforming it is considered. The memory of every reader, whether professional or lay, will doubtless supply him with enough instances of administrative inefficiency on the part of courts with which he has had experience, for him to grant the truth of the charge, and make him willing to proceed at once to an investigation of the causes and of the specific defects which tend to bring its inefficiency about.

Indeed, it is this popular conviction of the inefficiency of our courts that renders a careful analysis of the condition so necessary; for if reconstruction and reform must come, it is popular reform which is most to be dreaded, and which must be forestalled, if possible, before the demand for it can culminate in something hasty and ill-advised. It is the duty of every educated lawyer to put careful study upon the matter, and freed of the bias either of popular opinion or of his own predilections, to search for a remedy formulated upon unprejudiced conclusions. Where the modern system of judicial limitations is destructive of efficiency, let us boldly point it out, and institute a campaign to relax it as far as we can; where the ancient recognition of judidicial power was incompatible with the results of modern popular elections, let us recognize it, and seek relief in other directions. Where the modern demands for procedural simplicity are practicable, let us yield to them; where the ancient principles of procedural jurisprudence are essential, let us cling to them.

It is not the prime purpose of this article to identify the many

causes which have brought about the present condition of our judicial administration. That has already been done so scientifically by Mr. Roscoe Pound that most of the recent efforts at judicial reform have been based upon a recognition of the soundness of his conclusions. It is rather the purpose of this article to begin with his identification of the causes, and accepting them in the main as other students have done, to classify them and consider some of them more than appears to have been so far done, with a view to preparing the way for a discussion of the problem of removing them. And of course each important deficiency in our system of administering justice will then present a sub-problem to be solved by itself.

Mr. Pound's analysis of the objections to our present system was given in a paper read before the American Bar Association in 1906, entitled "The Causes of Popular Dissatisfaction with the Administration of Justice;"[1] and it would be a blessing if every American lawyer and every American legislator could read Mr. Pound's paper in full; for in addition to its value as a basis for structural reforms, it is one of the ablest essays in critical jurisprudence anywhere to be found.

After explaining the existence of certain unavoidable causes for popular dissatisfaction with any system of judicial administration, Mr. Pound identifies several features of our Anglo-American system of law which are entirely out of harmony with the social system of today, and so no longer capable of producing generally satisfying results. They include, 1, "the individualist spirit of the common law, which agrees ill with a collectivist age;" 2, the constitutional right of the courts as an incident to mere private litigation, to annul the will of the whole people as expressed in the enactments of the legislature; 3, the exercise by the courts of the right of judicial construction to override appar-

[1] Reports of American Bar Association XXIX, p. 395. The later reports of the American Bar Association show that the special committee of the association appointed to suggest remedies and formulate proposed laws was created as a direct result of Mr. Pound's article; and the recent federal legislation and bills now pending in Congress, together with the adoption of the new federal equity rules themselves seem to be traceable directly to that committee.

ently definite limitations of law written and unwritten; and 4, the uncertainty of case law.[2]

Mr. Pound then dwells upon what are generally recognized as the two greatest causes for dissatisfaction with the present administration of justice in America, our system of courts, archaic in their multiplicity, in the concurrence of their jurisdiction, and in their waste of judicial power, and our worn out system of procedure; and lastly he recognizes as causes the disappearance of the former ideals of the bench and bar, and the incidental lowering of public respect for the law.

Thus it will be seen that the inefficiency of our system of judicial administration is traced, first, to the ill adjustment of the common law as we inherit it to modern requirements; secondly, to defects in the constitution of our courts; thirdly, to defects in our system of procedure; and fourthly, to the lowering of the ideals of the bench and bar.

Professor John Chipman Gray used to open his first lecture to the law class at Harvard each year by saying that the law was an entire body, with no appropriate starting points at which to begin its study; and he has perpetuated the observation in his recently published book on jurisprudence.[3] But the entirety of the law extends further even than the study of the abstract principles of the system. The law itself, the procedure, and the jurisdictional statutes demarking the powers of the courts, are all one, and to a certain extent also the functions of the bar; and when they are torn asunder and the several parts considered separately, the margins are irregular and fragmentary. For instance, the separating line between a right and the procedure by which it is enforced, popularly called a remedy, is purely imaginary; and the same may be said of the line between a common law right of redress and the right to have the ear of the common law court to enforce it.[4]

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[2] The language of Mr. Pound has been paraphrased to avoid the quotation of his interesting elaboration for which there is not room in this article. Though his meaning may be thus incompletely expressed, it is believed his points will be grasped.

[3] "The Nature and Sources of the Law," § 20.

[4] This has been elaborated by the author in Appendix C to Sims Chancery Pleading and Practice in Alabama.

Therefore it is misleading to speak of reforming our courts and our procedure apart from reforming our system of law. But reformers are essentially iconoclasts, and iconoclasts as a rule do not make nice distinctions. Hence it is that most reformers admit that to restore the efficiency of our judicial system we need revolutionary changes in our courts and in our procedure, and a cleaning up of the bar; but they would hesitate to admit that our system of "substantive law" (to use their term) is far from what it should be to come up to modern requirements.

But failure to recognize the truth of Mr. Pound's charges against our system of law is due only to the lack of breadth of the average professional criticism. Indeed the public is broader in its analysis than the bar. What unprofessional critism of our administration of justice fails to express dissatisfaction of the justice awarded—the result, rather than the means to the end? The popular demand for anti-trust legislation reveals without specific criticism dissatisfaction with our system of laws. The creation of the extra-judicial tribunals known as railroad commissions and the demand for extension of their powers means the same thing. The effort in nearly every State and in the federal congress to enact an efficient workman's compensation act reveals radical rebellion against established rights of the common law. So the demands for anti-boycott acts, child labor acts, and the effort by the courts in deciding cases in which the public is interested, to avoid the effect of old property rights under the common law.

But perhaps the most convincing demonstration of ill adaptation of the old system of rights to the demands of modern commercial society is the satisfaction with which the present federal Bankrupt Act has been received by the public at large. Entirely revolutionary in their disregard of what must be called individual rights, rough justice is dealt out by the bankrupt courts with little regard for consistency or sometimes even the wording of the Bankrupt Law. And yet, apart from the value of its universal application to the whole country, the real litigants in most instances, the creditors, generally admit on being questioned, that they derive little or no benefit from it at all. And yet the several

states are endeavoring to adopt its provisions for administrations not subject to federal jurisdiction.[5]

In the light of all this evidence no one can doubt that the principles of the common law system of rights now falls substantially short of our social requirements. But if the common law is ill-adapted to the demands of modern society, the first relief to suggest itself of course is to adopt some other system of law. And while to do so would be exceedingly difficult, it is not as near impossible as it might seem. Every student of law history knows how the schoolmen and compilers of the thirteenth century poured into the law of England rights and theories which they learned in Italy.[6] And Coke gained his chief right to fame by defeating the effort to adopt the civil law fathered by Bacon three centuries ago. Moreover let it be recalled that Lord Mansfield in the latter half of the 18th century transcribed bodily into our law the whole system of the law merchant, because the conception of contract in the common law of his day could not be aligned with the trade rules observed in the daily use of commercial paper.

But if the common law has been materially changed in the past, of course it can be changed again; and the fact that grave defects are found in it today shows merely that masters like Bracton and Bacon and Mansfield have not been granted leave to work on it as they should, and that it should be turned over again to the schoolmen to undergo an adequate reform. Of the four important deficiencies in it noted by Mr. Pound—the individualist spirit of the common law, the power of the courts to determine any question if it happens to affect the issue between the parties,

[5] Compare the Alabama Insolvent Bank Laws. Code of Ala. 1907, §§ 3509 and 3560. Their fragmentary provision for the administration of justice were substantially augmented by the decision of the Supreme Court of Alabama in Oates *v.* Smith, decided in 1912 and not yet officially reported.

[6] Austin says that Bracton took fully a third of his commentaries from his Bolognese masters. And while later studies to be found in Vol. 8 of the Reports of the Selden Society greatly reduce that estimate, Bracton was the most English of the Schoolmen of his day, certainly if Glanville is excepted; and well nigh all the law of personalty in both Bracon and Blanville is taken from the law of Rome.

the extension of law under the fiction of merely declaring it, and the uncertainty of our corpus juris—perhaps none is to be found so prominent in the law of those countries which have adopted the law of Rome. But the two latter were conspicuous features of the law of Rome until it was codified;[7] and their ill effect with us may be largely abated by extending the field of our written law. And if the two former are distinctly our own, and our law has grown up around them, it by no means follows that constructive legislation cannot effect a cure.

The ideal system of judicial administration would seem to be that by which justice, as conformable to the estimate of a disinterested majority of on-lookers,[8] is awarded in the shortest time within which the issues of fact may be accurately determined. And it is impossible to tell in what proportion of litigated cases the justice of the court's judgment or award depends primarily upon the analysis of rights recognized by the body politic, and in what proportion the judgment depends primarily upon the establishment of facts. But the rights recognized, however limited may be their scope, involve a system; and that system is jurisprudence,[9] more or less complete according to the degree of civilization and education of the body politic. It may be conceived that originally the judgments of kings or priests in determining altercations between their subjects or followers were based upon no principles; but were direct revelations from the gods.[10] But it is a mark of the organized human mind to follow precedents; and as each case was followed by another approximately similar, principles were necessarily evolved. A rudimentary system, therefore, was unavoidable; and that system must reflect the

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[7] See Maine, Ancient Law, Introduction.

[8] Compare John C. Gray, the Nature and Sources of the Law, § 271; Sir Henry Maine, Ancient Law, Introduction, pp. XVIII, XIX. Arthur L. Corbin, in an article on "The Law and the Judges" in the Yale Review for January, 1914, says: "The aim of any legal system is general satisfaction." The text was written before Professor Corbin's article was delivered; but it is gratifying to find such support for the position. But let the reader not fall into arguing what justice is. See I Austin, Jur. 232, n.

[9] Compare Maine Ancient Law, p. 232.

[10] Maine, Ancient Law, Introduction, p. XV.

opinion of the majority of those subject to it, assuming that the majority must ultimately represent the enforcing power. The fact that different parts of the civilized world throughout the sweep of history have recognized several systems of law, some more complete than others, and all more or less different, demonstrates that the system of rights acknowledged must be substantially in accord in the long run with the opinion of the majority. Of course it need not be absolutely in accord with temporary opinion; for as the system becomes more complete it represents the crystallized conception of more than one generation. So that every system of law has been said to be the law of the dead rather than the law of the living.[11] But it is nevertheless under the control of the living, and will be made to conform substantially to their opinions.

The nations of Europe, their offshoots and dependencies, have acknowledged by about equal division[12] two systems of jurisprudence as defining rights between man and man, the Roman, or Civil Law; and English, or Common Law; and we in this country have generally fallen heir to the latter, the chief recommendation of which has been always declared to be its flexibility to follow the demands of each passing period. It now comes about, however, that this very flexibility is something of an objection; and modern commercial society craves the certainty attached to the written codes developed under the sway of the civil law. It therefore appears that one of the underlying principles of our law must give way to the present idea of efficiency required of our judicial administration; and the *reductio ad absurdum* involved in the desire for a fixed code as the last development of changing jurisprudence merely proves that such a code must be revised and repromulgated every few years. And if approximate permanency, as well as certainty, can be attained, the reform is well worth instituting. While in many jurisdictions it may not be realized at first that, to be satisfactory, it must be done exceedingly well, each jurisdiction soon

[11] See the same paper by Professor Pound, citing Herbert Spencer, Principles of Sociology, II, p. 514.

[12] Hannis Taylor in 22 Harvard Law Review, p. 244.

learns to copy from its neighbors, and good codes would soon be the rule.

Nor are the other three defects noted in our jurisprudence much less important than that attributable to our system of case law, although they are hardly so apparent. The exercise by the courts of the right of judicial construction to override apparently definite limitations of both written and unwritten law, is in a sense a corollary of our system of case law. It is the legal fiction by which law already established is made to apply, professedly without change, to facts essentially new. It is involved more or less in every new judgment, and is not peculiar to the common law. The Roman law as well as the common law expanded by means of legal fictions, "presenting paralleled processes of innovation in existing rules" through judge-made law.[13] True, it is not alone as a corollary of our system of case law that this recognized power of the courts has become popularly distasteful; being even more vehemently condemned by a large part of the people when resorted to to nullify the ordinary meaning of a statute. The recent decisions of the Supreme Court of the United States in the Standard Oil Case is a notable example.[14] But until statutes are enacted with more deliberation than is possible in the short legislative sessions provided by most State constitutions, conservative reformers will not admit that the power of the courts to neutralize radical though constitutional statutes needs to be greatly curbed; and the recognition of that view confesses a weakness in our social status rather than in our jurisprudence. We will, therefore, class the power of the courts to construe, in so far as the construction becomes a precedent, as only a phase of our theory of case law, and pass to the consideration of the other two objections made to our jurisprudence—the individualist spirit of the common law, and the power of the courts to determine the constitutionality of statutes as an incident to litigation purely private in its nature.

At first thought it would appear that these two objections stand likewise in the relation of principle and corollary; for it is

[13] Hannis Taylor, *ubi supra;* Maine, Ancient Law, Intro.
[14] Standard Oil Company *v.* U. S., 221 U. S. 1.

only in the recognition of the individual character of litigation that the right of the courts to nullify statutes infringing individual rights has become established.[15] But on second thought it is evident that the power of the court to nullify a statute as affecting individual rights, instead of being a corollary to the individualist principle of the common law is antagonistic to it, and is not theoretically even an objection at all. In so far as the common law is a law for simple society, arming rural shippers against the encroachments of stage carriers and not of railway systems, and protecting journeymen against the assaults of strangers and not of fellow workmen, it is not a basis for social order today. But in so far as our courts protect individuals against the encroachments of society as expressed in a statute, the common law has developed into a bulwark adequate to modern requirements.

To grant this does not gainsay that the absolute nullification of a public statute by a decision in private litigation is a serious defect in our jurisprudence; but it proves that our law has grown since the days of Coke and Littleton sufficiently to protect individuals against the encroachments of organized society, though it has not adequately developed to protect them against the oppression of private organizations. And it becomes apparent that the objectionable effect of the power of the courts in declaring statutes unconstitutional in private litigation is merely another application of the principle of case law, and the correction may be referred to the problem of modifying that principle.

So we have left to consider only the first defect noted in our system of law, namely, its failure to protect adequately the individual; and this means merely that the law has not given him enough rights; which are granted most effectively by legislation.

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[15] The critical reader will at once object that our courts do not declare statutes absolutely unconstitutional, but only unconstitutional as affecting the rights of the individual litigants. So that until other persons bring their complaints against the statute for adjudication, they have no right to disregard its legality. But if the principle of case law is accepted by which the decision on that statute once made will be followed in the absence of new light on the matter, when the statute is brought again for construction, it is quibbling to say that the statute is not nullified once for all.

A great deal has been said and written in the last few years about the use and efficiency of remedies, due largely, it would seem, to the modern habit of discussing and displaying legal subjects in the form of encyclopædias. And as a result such confusion has arisen that some have spoken of remedies as if they were broader than rights. It requires little reflection, however, to see that a remedy is but an unscientific name for a right,[16] and that when we need a remedy, we need a right as well.

But to create new rights by legislation is not necessarily a revolution of the common law; legislation was one of the earliest modes of expanding every system of law; and the common law was not an exception. Only, the rights heretofore added to the common law by legislation were added gradually; witness the few books of statutes that have come down to us from Edward I through the four Georges. The revolution in our common law by way of legislation which is called for today, consists rather in the great number of new rights which must be added at once to make the system complete where now it provides for the simple individual relationships alone. It may well be that if we go on without such sudden additions, in due course of time the new rights in keeping with our "collectivist age" will be added by judge made law aided by occasional legislation. But since the collectivist age has come rapidly upon us, why wait for the law to mould itself gradually to its demands, when by consent of the body politic, it may be accomplished at once by legislation? Surely it is due to the suddenness of the descent of the collectivist age that the law has been caught napping; for none denies the suddenness of the descent of this intensely commercial age, beginning less than two decades ago.

It would seem, then, that the ill adjustment of the common law as we received it, to present requirements, revealed chiefly in its uncertainty and the incompleteness of its system of rights, while a great factor in the much talked of inefficiency of our judicial system, may be solved without abandoning the system, and

[16] The author of this article has endeavored to prove this in XXI Yale Law Journal 215.

in a not untheoretical way. It requires merely detailed legislation and detailed codification, the ultimate success of which can be guaranteed by education and infinite care. But the fact that part of the remedy, codification of rights, has been so far unattempted in American common law States, shows not merely that the deficiency of the common law as a cause of the complaints against justice is not generally realized, but it shows also how far behind in the study of the science of jurisprudence our American people are. Our schoolmen and students may not be to blame for the unwieldy growth of our courts, for the unscientific character of our procedure, or for the condition of our bar. Those are all the outgrowth of the daily operation of business, with which schoolmen and students have little to do. But our system of law is peculiarly the subject of study for our schools; to whom we must look chiefly for its reform. And they cannot claim that their wonderful growth in America during the last fifteen years has justified itself in obtaining for them due influence in the scientific moulding of the laws. Can it be doubted that the hundreds of works on jurisprudence that have been produced by the German students of the civil law, were responsible for the selection of Herr Rudolph Sohm as chairman of the last commission to compile the German Civil Code? [17]

It is by no means intended to minimize the deficiency of the average system of State courts in force throughout the country, with its multitude of concurrent jurisdictions and its graduations of appeal; nor to discourage the movement to reform our degenerate procedure, worn out by hundreds of ill-timed amendments until little or no resemblance to the old English originals has been left. Nor is it intended to divert criticism from the present ideals and practices apparently dominant among the Amercan Bar. Each of these deficiencies in our system presents a phase of the

[17] "In order to give formal unity to the private law of Germany, and at the same time to create a body of law, endowed with real vital force and capable, by its inherent strength, of attracting the genius of German scientific research, a German civil code was required. This accordingly was the task which devolved on the new imperial legislature when the German Empire had at last been established." Sohm: Institutes, p. 7.

problem—a sub-problem which must be studied and solved. It is meant only to insist that another phase of the problem—another sub-problem—must be pursued as seriously as those three, the problem of reforming the law. And if it is the deficiency most easily remedied of them all, because most abstract, requiring less prolonged experimentation in determining its solution, it is the problem demanding the most profound study, requiring the most education to be solved. So that the student who approaches it will feel sometimes all but ashamed of his presumption to try, and advance humbly and prayerfully like a neophite in the Temple of God.

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